THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0003, Appeal of Lori Madore, the court on October 10, 2007, issued the following order:

The employee, Lori Madore, appeals an order of the compensation appeals board (board). She argues that the board erred in calculating her average weekly wage. We affirm.

On appeal, we will uphold an order of the board unless it is erroneous as a matter of law or the employee demonstrates that the order is unjust or unreasonable. Appeal of Mikell, 145 N.H. 435, 438 (2000).

RSA 281-A:15, I, provides in relevant part:

> I. Except as provided in paragraphs II and III of this section and of RSA 281-A:32 and subject to RSA 281-A:28, 281-A:28-a and RSA 281-A:31-a, an average weekly wage shall be computed by using the method in subparagraph (a) or (b), or (c) that yields the result more favorable to the injured employee:
>
> > (a) By dividing the gross earnings of the injured employee in the service of the same employer during the preceding 26 weeks by that number of weeks; or
> > (b) By dividing the gross earnings of the injured employee in the service of the same employer during a period exceeding 26 weeks but not exceeding 52 weeks by the appropriate number of weeks.
> >
> > (c) If, however, by reason of the shortness of time during which the employee has been in the employment of the employer or because of the nature or term of the employment, it is inequitable to compute the average weekly wage using the method in subparagraph (a) or (b), regard may be had to the rate of pay designated in the injured employee's agreement of employment or to the gross earnings of persons in the same grade employed at the same work by the same employer or, if there are no persons so employed, by persons of the same grade employed in the same class of employment in the same locality.

RSA 281-A:15, I (Supp. 2004).

The board found the following facts. The employee began full-time employment as an LNA with the employer in 1994. In September 2003, she changed her status to per diem. She seldom worked between September 2003 and September 2004, when she advised her supervisor that she was available for work. Although her status as a per diem employee did not change, her scheduled work hours increased. She was injured in December 2004.

On appeal, she argues that, under Appeal of Mikell, 145 N.H. 435 (2000), the board was required to calculate her average weekly wage based upon the number of weeks that she actually worked; therefore, rather than calculating her average weekly wage on the basis of twenty-six weeks, the board should have used thirteen weeks. We disagree.

In Mikell, the employee had been employed for twenty-one weeks prior to her injury; she was employed part-time for nine weeks and then became a full-time employee for the twelve weeks preceding her injury. Unlike the employee in this case, Mikell had not been in the employ of the same employer for the preceding twenty-six weeks. Accordingly, we held that Mikell's average weekly wage should be calculated based upon the number of weeks that she actually worked. We remanded the case to the board for further consideration of whether the nature of Mikell's employment rendered application of RSA 281-A:15, I(a) inequitable.

In this case, the employee had been in the service of the same employer for the preceding twenty-six weeks; indeed, her service exceeded the fifty-two weeks referenced in RSA 281-A:15, I(b). Although she advised her supervisor that she was available for work in September 2004, she retained her status as a per diem employee with no guarantee of minimum hours. The board found that whether the employee worked depended upon whether the employer needed an LNA and whether the employee was available.

The facts in this case are therefore distinguishable from Mikell, where the employee was a full-time employee at the time of her injury but faced the prospect of having her average weekly wage calculated based in part upon her early service as a part-time employee. We therefore find no error in the board's decision to calculate the employee's average weekly wage based upon her twenty-six weeks of service because it yielded a more favorable result to her than a calculation based upon fifty-two weeks. Finally, the employee testified that her status as a per diem LNA did not change, despite the increase in her scheduled work hours, and that no guarantee was given by her or the employer regarding the increased hours. In light of that evidence, we find no error in the board's

decision not to compute the employee's average wage pursuant to RSA 281-A:15, I (c).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk